

LAW OFFICE OF  
DAVID J. WEINSOFF  
138 Ridgeway Avenue  
Fairfax, California 94930  
tel. 415-460-9760  
david@weinsofflaw.com

AUG 20 2019

***Via Certified Mailing – Return Receipt***

August 12, 2019

John Kane, Winemaker/Managing Agent  
Beverlie Franzen, Environmental & Safety Director  
Eduardo Guillisasti Gana, CEO  
Fetzer Vineyards  
12901 Old River Road  
Hopland, CA 95449-9813

**Re: Supplemental Notice of Violations and Intent to File Suit Under the Federal  
Water Pollution Control Act (Clean Water Act)**

Dear Mr. Kane, Ms. Franzen, Mr. Gana, and Managing Agent:

**SUPPLEMENTAL NOTICE OF ALLEGED VIOLATIONS**

This is a Clean Water Act (“CWA”) Supplemental Notice to the CWA Notice dated June 4, 2019. This Supplemental Notice is provided on behalf of California River Watch (“River Watch”) in regard to violations of the CWA, 33 U.S.C. § 1251 *et seq.*, that River Watch believes are occurring at the winery owned and/or operated by Fetzer Vineyards and Vina Concha y Toro S.A. (“Winery”) located at 12901 Old River Road in Hopland, California. Notice is being sent to you as the responsible owners, operators, and managers of the Winery and real property. This Supplemental Notice addresses the violations of the CWA, including violation of the new terms of the General California Industrial Storm Water Permit, and the unlawful discharge of pollutants from the Winery directly into the Russian River, a navigable water of the United States impaired under CWA § 303(d) for sediment, temperature, pathogens throughout the watershed, with dissolved oxygen, mercury, aluminum and phosphorus in certain reaches.

CWA § 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters of the United States unless such discharge is in compliance with various enumerated sections of the Act. Among other things, CWA § 301(a) prohibits discharges not authorized by, or in violation of, the terms of an individual National Pollutant Discharge Elimination System (“NPDES”) permit or a general NPDES permit issued pursuant to CWA § 402(p), 33 U.S.C. § 1342(p). CWA § 402(p), 33 U.S.C. § 1342(p) establishes a framework for regulating storm water discharges under the NPDES program. States with approved NPDES permitting programs are authorized under this section to regulate storm water discharges through permits issued to dischargers and/or through the issuance of a single, statewide general permit applicable to all storm water dischargers. Pursuant to CWA § 402, the Administrator of the U.S. Environmental

Protection Agency (“EPA”) has authorized California’s State Water Resources Control Board (“SWRCB”) to issue NPDES permits including general NPDES permits in California.

The SWRCB elected to issue a statewide general permit for industrial dischargers and issued NPDES Permit No. CAS000001, SWRCB Order No. 92-12-DWQ (the “General Permit”) on or about November 19, 1991, modified it on or about September 17, 1992, reissued it on or about April 17, 1997, and amended it significantly on April 1, 2014 (effective July 1, 2015), pursuant to CWA § 402(p). In order to discharge storm water lawfully in California, industrial Dischargers must comply with the terms of the General Permit or have obtained an individual NPDES permit and are in compliance with its terms.

Note that in addition to violations of the General Permit, this Supplemental Notice also alleges that the Winery is discharging pollutants from point sources to a water of the United States without complying with the CWA. These point sources are the Winery waste ponds and pomace disposal area. The discharge is to the Russian River, a water of the United States.

CWA § 505(b) requires a citizen to give notice of the intent to file suit sixty (60) days prior to the initiation of a civil action under Section 505(a) of the Act. Notice must be given to the alleged violator, the EPA, and the state in which the violations occur. As required by the CWA, this Supplemental Notice provides notice of the violations that have occurred and continue to occur at the Winery. Consequently, Fetzer Vineyards and Vina Concha y Toro S.A. (“Fetzer”) is placed on formal notice by River Watch that after the expiration of sixty (60) days from the date of this Supplemental Notice, River Watch will be entitled to bring suit in the United States District Court against Fetzer for continuing violations of an effluent standard or limitation, NPDES permit condition or requirement, or Federal or State Order issued under the CWA (in particular, but not limited to, CWA § 301(a), § 402(p), and § 505(a)(1)), as well as the failure to comply with requirements set forth in the California Code of Federal Regulations and the North Coast Regional Water Quality Control Board (“RWQCB”) Water Quality Control Plan or “Basin Plan.”

The CWA requires that any notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto shall include sufficient information to permit the recipient to identify the following:

**1. The Specific Standard, Limitation, or Order Alleged to Have Been Violated.**

To comply with this requirement, River Watch notices Fetzer of ongoing violations of the substantive and procedural requirements of CWA § 402(p) and violations of NPDES Permit No. CAS000001, SWRCB Order No. 92-12-DWQ as amended by Order No. 97-03-DWQ and Order No. 2014-0057-DWQ (the General Permit) relating to services and operations taking place at the Winery.

Fetzer, rather than seeking coverage under an individual NPDES permit, filed a Notice of Intent (“NOI”) agreeing to comply with the terms and conditions of the General Permit. The SWRCB approved the NOI on or about September 8, 1997 and Fetzer is assigned Waste Discharge Identification (“WDID”) number 1 23I013405. River Watch, on the basis of eye-witness reports, records publicly available, and/or records in the possession and control of Fetzer,

contends that in the continuing winery operations taking place at the Winery, conducted both indoors and outdoors where they are subject to rain events, Fetzer has failed to comply from Annual Reporting Year 2015-2016 to the present with the strict terms and conditions of the General Permit.

In addition to the alleged violations of the terms and conditions of the General Permit, River Watch alleges violations of the provisions of discharge prohibitions contained in the RWQCB's Basin Plan, which are incorporated by reference as part of the compliance obligations imposed on the Winery under the General Permit (General Permit Section I.C.29).

Finally, if Fetzer claims that the discharges from the Winery pomace disposal area or wastewater ponds are not stormwater-related, then Fetzer is still in violation of the CWA for discharging pollutants to a water of the United States without complying with other sections of the CWA (*see* CWA §§ 301 and 505). Except for non-storm water discharges ("NSWDs") authorized in discharges of liquids or materials other than storm water, discharges either directly or indirectly to waters of the United States are prohibited unless authorized by another NPDES permit. Fetzer has no other applicable NPDES permit.

## **2. The Activity Alleged to Constitute a Violation.**

Full compliance with the mandates of the General Permit is not a mere statutory and regulatory exercise. The lands in and surrounding Russian River Watershed produce a harvest of unparalleled bounty that draws acclaim worldwide. Failing to care for this critical environment as alleged in this Supplemental Notice is a violation not only of law, but an abrogation of the trust we demand of Mendocino County landowners. Fetzer appears to support this, as it proclaims on its website – "What's good for the Earth is good for the grape, and what's good for the grape is good for the wine. It was true 50 years ago, and it will still be true 50 years from now. Everything we do – how we nurture our land, how we make our wine – reflects a longstanding commitment to minimizing our impact on the environment. Because how we care for the Earth matters." (*See* <https://www.fetzer.com/>). In 2011, the Winery was acquired by Concha y Toro, S.A., the largest Latin American producer of wines.

Having agreed to its terms, Fetzer has a continuing burden to demonstrate compliance with each and every applicable provision of the General Permit. River Watch alleges the following actions and inactions as violations of the General Permit:

### **a. Failure to Properly Sample and Monitor Storm Water Discharges**

Under the new General Permit, Fetzer is required to comply with all of the following:

- i. "Collect and analyze storm water samples from two (2) Qualifying Storm Events ("QSEs") within the first half of each reporting year (July 1 to December 31), and two (2) QSEs within the second half of each reporting year (January 1 to June 30)" (General Permit Section XI.B.2 and SWPPP Section 5.6.1 ("*Sampling Schedule*").

River Watch, following review of the SWRCB's SMARTs reporting database, contends Fetzer failed to comply with this requirement by sampling and analyzing for one of the required two (2) samples during the first half of the 2017-2018 Annual Reporting Year, and none of the required two (2) samples during the first half of the 2018-2019 Annual Reporting Year.<sup>1</sup>

- ii. "Analyze all collected samples for the following parameters: "(a) Total suspended solids (TSS) and oil and grease (O&G); (b) pH ...; (c) Additional parameters identified by Fetzer on a facility-specific basis that serve as indicators of the presence of all industrial pollutants identified in the pollutant source assessment ..." (General Permit Section XI.B.6.a.-c.).

River Watch, following review of the "Analytical Reports" of the storm water samples reported by Fetzer, alleges Fetzer failed to reveal monitoring and analysis of the full range of pollutants required by the General Permit. The Reports provide sampling for Oil and Grease, Total Suspended Solids, and pH (with violations identified in sample results of pH confirmed in the "Level 1 ERA Report" prepared by Fetzer for the Winery dated December 27, 2017), but failed to provide sampling results from the "List of Identified Pollutants within the Impaired Watershed" that should be identified by Fetzer in its Annual Reports; zinc and copper resulting from transportation activities at the Winery; and critically the "additional parameters identified by Fetzer on a facility-specific basis that serve as indicators of the presence of industrial pollutant identified in the pollutant source assessment ..." (General Permit Section XI.B.6.c).<sup>2</sup>

b. Failure to Comply with Receiving Water Limitations and Discharge Prohibitions

The General Permit requires Fetzer to ensure that industrial storm water discharges and authorized NSWDS do not: (a) cause or contribute to an exceedance of any applicable water quality standards in the Russian River including its tributaries (General Permit Section I.E.37, VI.A.); (b) adversely affect human health or the environment (General Permit Section VI.B.); and, (c) do not contain pollutants in quantities that threaten to cause pollution or a public nuisance (General Permit Section III.C., VI.C.). Fetzer provides no evidence of complete compliance with these requirements for the Winery's transportation related areas, pomace disposal area, and wastewater ponds.

c. Failure to Comply with Total Maximum Daily Loads (TMDLs) Requirements

---

<sup>1</sup> In addition, Fetzer's required Annual Report for Annual Reporting Year 2015-2016 is not available on the SMARTS website, in violation of General Permit Section XVI and as required by the Winery's SWPPP Section 1.11.

<sup>2</sup> River Watch observes that Fetzer's Amended July, 2019 SWPPP for the Winery revises significantly the list titled "Industrial Pollutants" identified in Fetzer's prior SWPPP and included as Exhibit A in River Watch's June 4, 2019 Notice Letter. The difference in the pollutant list is so significant – with the current list reduced to pH, oil & grease (which are otherwise required by the General Permit to be sampled), that River Watch concludes a "reasonable potential analysis" should be conducted by Fetzer to determine with accuracy what pollutants are actually on-site, used in industrial operations, and require sampling and monitoring.

As the Russian River and its tributaries are CWA § 303(d) listed, when Fetzer applied for NOI coverage under the new General Permit, it was required to submit data and/or information, prepared by a Qualified Industrial Storm Water Practitioner (“QISP”), demonstrating that Fetzer: (1) eliminated all exposure to storm water of the pollutants for which the water body is impaired, has documented the procedures taken to prevent exposure onsite, and has retained such documentation with the SWPPP at the Winery; (2) the pollutant for which the water body is impaired is not present at the Winery; or (3) the discharge of any listed pollutant will not cause or contribute to an exceedance of a water quality standard (General Permit Section VII.B.). River Watch could find no documentation from Fetzer demonstrating compliance with these requirements.

d. Failure to Prepare and Implement an Adequate SWPPP

i. Assessment of Potential Pollutant Sources

The SWPPP for the Winery fails to include a sufficient narrative assessment of all areas of industrial activity with potential industrial pollutant sources: (i) likely to be present in industrial storm water discharges and authorized NSWDS; (ii) the degree to which the pollutants associated with those materials may be exposed to, and mobilized by contact with, storm water; and; (iii) the identification of the industrial pollutants related to the receiving waters with CWA § 303(d) listed impairments or approved TMDLs that may be causing or contributing to an exceedance of a water quality standard in the receiving waters (General Permit Section X.G.2.i, iv, and ix).

Although Fetzer has identified certain facility-specific activities at the Winery known to create pollution, it has failed to identify additional parameters associated with these facility-specific industrial pollutants. For example, Fetzer identifies transportation activities taking place at the Winery but fails to test for copper or zinc, which are known pollutants from tires, brake pads, fuels and lubricants. Fetzer has also failed to identify or test for these transportation-related pollutants in its parking lots, vehicle storage area(s), or other transportation surfaces.

ii. Site Map

The Winery’s site map is inadequate. Fetzer states on its May 12, 2015 NOI that the site size is 50 acres, with 0.25 acres comprising the “Industrial Area Exposed to Storm Water.” The Amended July, 2019 SWPPP states that the “Fetzer Vineyard site comprises approximately 5 industrial acres.” (SWPPP Section 1.1). The Facility Site Map included in SWPPP Appendix A (dated 06/26/19) fails both to clarify this inconsistency and to provide the detailed list of information required by the General Permit. Specifically, the site map does not include: (a) sufficient notes, legends, and other data as appropriate to ensure the map is clear, legible and understandable; (b) the actual site-facility boundary, storm water drainage areas within the site-facility boundary, and portions of any drainage area impacted by discharges from surrounding areas; (c) the flow direction of each drainage area, on-facility surface water bodies, areas of soil erosion, and location of nearby water bodies (such as rivers, lakes, wetlands, etc.) or municipal storm drain inlets that may receive the Winery’s industrial storm water discharges and authorized NSWDS; all the locations of storm water collection and conveyance systems, associated discharge locations, and direction of flow; (d) the locations and descriptions of structural control

measures such as catch basins, berms, detention ponds, secondary containment, oil/water separators, diversion barriers; (e) the identification of all impervious areas of the Winery including paved areas such as roads, parking lots, vehicle storage areas and the like (General Permit Section X.E.).

**3. The Person or Persons Responsible for the Alleged Violation.**

The entity responsible for the alleged violations is Fetzer Vineyards, owned and operated by Concha y Toro, S.A., the largest producer of wines from Latin America.

**4. The Location of the Alleged Violation.**

The location of the various violations is the permanent address of the Winery at 12901 Old River Road in Hopland, California, including the waters of the Russian River and its tributaries – waters of the United States.

**5. The Date or Dates of Violation or a Reasonable Range of Dates During Which the Alleged Activity Occurred.**

The range of dates covered by this Supplemental Notice is from July 1, 2015 to August 12, 2019. River Watch will from time to time update this Supplemental Notice to include all violations which occur after the range of dates covered by this Supplemental Notice. Some of the violations are continuous in nature, therefore each day constitutes a violation.

**6. The Full Name, Address, and Telephone Number of the Person Giving Notice.**

The entity giving this Supplemental Notice is California River Watch, an Internal Revenue Code § 501(c)(3) nonprofit, public benefit corporation organized under the laws of the State of California, with headquarters located in Sebastopol, California. River Watch's mailing address is 290 South Main Street, #817, Sebastopol, California 95472. River Watch is dedicated to protecting, enhancing and helping to restore surface water and groundwaters of California including coastal waters, rivers, creeks, streams, wetlands, vernal pools, aquifers and associated environs, biota, flora and fauna, and to educating the public concerning environmental issues associated with these environs.

River Watch may be contacted via email: [US@ncriverwatch.org](mailto:US@ncriverwatch.org), or through its attorneys. River Watch has retained legal counsel with respect to the issues set forth in this Supplemental Notice. All communications should be directed to:

David Weinsoff, Esq.  
Law Office of David Weinsoff  
138 Ridgeway Avenue  
Fairfax, CA 94930  
Tel. 415-460-9760  
Email: [david@weinsofflaw.com](mailto:david@weinsofflaw.com)

## REMEDIAL MEASURES REQUESTED

River Watch believes that at a minimum implementing the requirements of the General Permit outlined in Section 2 of this Supplemental Notice is necessary in order to bring the Winery into compliance with the CWA and reduce the biological impacts from its non-compliance upon public health and the environment.

## CONCLUSION

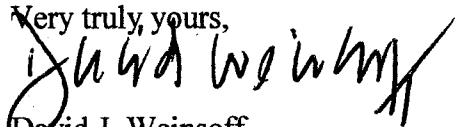
The violations set forth in this Supplemental Notice effect the health and enjoyment of members of River Watch who reside and recreate in the affected community. Members of River Watch may use the affected watershed for recreation, sports, fishing, swimming, hiking, photography, nature walks and/or the like. Their health, use, and enjoyment of this natural resource is specifically impaired by Fetzer's alleged violations of the CWA as set forth in this Supplemental Notice.

The General Permit, in the very first "Standard Condition," states that "Dischargers shall comply with all standard conditions in this General Permit. Permit noncompliance constitutes a violation of the Clean Water Act and the [California] Water Code and is grounds for enforcement action and/or removal from General Permit coverage" (General Permit Section XXI.A). The gravity of ensuring that the Annual Reports submitted to the State of California are complete and accurate is highlighted by the General Permit requirement that the person signing and certifying the document certifies that "to the best of my knowledge and belief, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations" (General Permit Section XXI.L).

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for unpermitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), §1362(5). An action for injunctive relief under the CWA is authorized by 33 U.S.C. §1365(a). Violators of the Act are also subject to an assessment of civil penalties of up to \$54,833.00 per day/per violation pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §§ 1319(d), 1365. *See also* 40 C.F.R. §§ 19.1-19.4. River Watch believes this Supplemental Notice sufficiently states grounds for filing suit in federal court under the "citizen suit" provisions of CWA to obtain the relief provided for under the law.

The CWA specifically provides a **60-day** "notice period" to promote resolution of disputes. River Watch encourages Fetzer to contact counsel for River Watch within **20 days** after receipt of this Supplemental Notice to continue on-going discussions regarding the allegations detailed in this Supplemental Notice. In the absence of productive discussions to resolve this dispute, or receipt of additional information demonstrating the Winery is in compliance with the strict terms and conditions of the General Permit, River Watch will have cause to file a citizen's suit under CWA § 505(a) when the 60-day notice period ends.

Very truly, yours,

  
David J. Weinsoff

DW:lm

**Service List**

Andrew Wheeler, Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N. W.  
Washington, D.C. 20460

Michael Stoker, Regional Administrator  
U.S. Environmental Protection Agency  
Pacific Southwest, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Eileen Sobeck, Executive Director  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Cindy Devries, Registered Agent  
Fetzer Vineyards  
12901 Old River Road  
Hopland, CA 95449-9813

Corporation Service Company, Registered Agent  
Fetzer Vineyards, Inc.  
40 Technology Parkway South # 300  
Norcross, GA 30092

VCT USA, Inc.  
P.O. Box 611  
Hopland, CA 95449-0611

Peter J. Kiel, Esq.  
DICKENSON, PEATMAN & FOGARTY  
1455 First Street / Suite 301  
Napa, CA 04559